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THE RHODE ISLAND QUESTION. MR. WEBSTER'S ARGUMENT IN THE SUPREME COURT OF THE UNITED STATES, JAN. 27, 1848, AGAINST THE VALIDITY OF THE "PEOPLE'S CONSTITUTION," IN RHODE ISLAND.

[It has been our purpose from the beginning, as often declared, to avoid all party questions, so far as we can do so, and still present faithfully the great questions of jurisprudence, as they arise and become settled. Adhering to this purpose, we publish this great argument of Mr. Webster, because we regard it as one of the mightiest efforts of the master intellect of this age; because it deals with the gravest questions which can arise under any free government; and because we wish our Journal, if possible, to contain, in every number, something that shall make it worth preserving and being read, when all present party strifes shall have been forgotten. We have tried to shorten it by omitting parts. But we fear our readers will not thank us. For, like all Mr. Webster's arguments, it exhibits that massive logic, where, every link broken, is an essential part of the chain. EDS.]

MR. WEBSTER said there was something novel and extraordinary in the case now before the Court. It is not such a one as is usually presented, all will admit, for judicial consideration.

It is well known, that in the years 1841 and 1842, political agitation existed in Rhode Island. Some of the citizens undertook to form a new Constitution of Government, beginning their proceedings toward that end by meetings of the people, held without authority of law, and conducting those proceedings through such forms as led them in 1842 to say they had established a Constitution and a form of Government. The previously existing, and then existing government of Rhode Island, treated these proceedings as nugatory, so far as they went to establish a new Constitution, and as criminal so far as they proposed to confer authority upon any persons to interfere with the acts of the existing government.

All will remember that the state of things approached, if not ac-

tual conflict between men in arms, at least "least the perilous edge of battle." Arms were resorted to, force was used, and greater force threatened.

In June, 1842, this agitation subsided. The new government, as it called itself, disappeared from the scene of action. The former government, the charter government, as it was sometimes styled, reassumed undisputed control, went on its ordinary course, and the peace of the State was restored.

But the past had been too serious to be forgotten. The Legislature of the State had, at an early stage of the troubles, found it necessary to pass special laws for the punishment of the persons concerned in these proceedings. It defined the crime of treason as well as smaller offences, and declared martial law. Gov. King proclaimed the existence of treason and rebellion in the State, and declared the State under martial law.

This having been done, and the ephemeral government of Mr. Dorr having disappeared, the grand juries of the State found indictments against several persons for having disturbed the peace of the State, and one against Dorr for treason. The indictment against Dorr came on in the Supreme Court of Rhode Island in 1844, before a tribunal, admitted on all hands to be the legal judicature of the State. He was tried by a jury of Rhode Island, above all objection, and after all challenge. By that jury, under the instructions of the Court, he was convicted of treason, and sentenced to imprisonment for life.

Now an action is brought in Courts of the United States, and before your honors by appeal, in which it is attempted to prove that the characters of this drama have been oddly and wrongly cast; that there has been a great mistake in the Courts of Rhode Island. They say that Mr. Dorr, instead of being a traitor or an insurrectionist, was the real Governor of the State at the time; that the force used by him was exercised in defence of the Constitution and laws, and not against them; that he who opposed the constituted authorities, was not Mr. Dorr, but Gov. King; and that it was he who should have been indicted and tried. This is rather an important mistake, to be sure, if it be one. "Change places," says poor Lear, "and, *handy-dandy*, which is the Justice, and which the thief!" So do our learned opponents say to us: "Change places, and, *handy-dandy*, which is the Governor, and which is the rebel!"

The aspect of the case, therefore, is, as I have said, novel. It may perhaps give vivacity and variety to judicial investigations.

It may relieve the drudgery of perusing briefs, demurrers, and pleas in bar, bills in equity, and answers, and introduce topics which give sprightliness and freshness, and novelty to Courts at law.

However impossible it may be,—and I suppose it to be *wholly* impossible,—that you should take judicial cognizance of the questions which the plaintiff has presented to the Court below, yet I do not think it a matter of regret that the cause has come hither. It is said, and truly said, that the case involves the consideration and discussion of what are the true principles of government in our American System of Public Liberty. This is very right. The case does involve these questions, and harm can never come from their discussion, especially when such discussion is addressed to reason and not to passion; when it is had before magistrates and lawyers, and not before excited masses out of doors. I agree entirely that the case does raise considerations, somewhat extensive, of the true character of the American System of Popular Liberty; and although I am constrained to differ from the learned counsel who opened the cause for the plaintiff in error, on the principles and character of that American Liberty—upon the characteristics of that American System on which changes of the government and Constitution, if they become necessary, are to be made, yet I agree with him that this case does present them for consideration.

Now there are certain principles of public liberty, which, though they do not exist in all forms of government, exist nevertheless to some extent in different forms of government. The protection of life and property, the *habeas corpus*, trial by jury, the right of open trial—these are principles of public liberty existing in their best form in the republican institutions of this country, but, to the extent mentioned, existing in the Constitution of England. Our American liberty, allow me to say, therefore, has an ancestry, a pedigree, a history. Our ancestors brought to this continent all that was valuable, in their judgment, in the political institutions of England, and left behind them all that was without value, or that was objectionable. During the colonial period, our ancestors were closely connected with the colonial system; but they were Englishmen as well as colonists, and took an interest in whatever concerned the mother country, especially in all great questions of public liberty in that country. Therefore they took an interest in the Revolution of 1688. The American colonists had suffered from the tyranny of James the Second. Their charters had been wrested from them by mockeries of law, and by the corruption of Judges in the city of London; and

in no part of England was there more gratification, or a more resolute feeling, when James abdicated, and William came over, than in the American colonies. All know that Massachusetts immediately overthrew what had been done under the reign of James, and took possession of the colonial fort in the name of the new King.

When the United States separated from England by the Declaration of 1776, they departed from the political maxims and examples of the mother country, and entered upon a course more exclusively American. From that day down, our institutions and our history relate to ourselves. Through the period of the Declaration of Independence, of the Confederation, of the Convention, the adoption of the Constitution, all these are records out of which our system of American Liberty is to be drawn

From the declaration of Independence, the governments of what had been colonies before, were adapted to their new condition. They no longer held allegiance to crowned heads. No tie bound them to England. The whole system became entirely popular, and all Legislative and Constitutional provisions had regard to this new, peculiar American character which they assumed. Where the form of government was already well enough, they let it alone. Where it was necessary, they reformed it. What was valuable, they retained; what was essential they added, and no more. Through the whole proceeding, from '76 to the latest period, the whole course of American public acts—the whole progress of this American System —was marked by a peculiar conservatism. Their object was to do what was necessary, and no more; and to do that with the utmost temperance and prudence.

Now, without going into historical details at length, let me state what I understand the American principles to be on which this system rests.

First and chief, no man makes a question tnat the people are the source of all political power. Government is instituted for their good, and its members are their agents or servants. He who would argue against this, must argue without an adversary. And who thinks there is any peculiar merit in asserting a doctrine like that in the midst of twenty millions of people, when nineteen millions, nine hundred and ninety-nine thousand, nine hundred and ninety-nine of them, hold it as well as himself? There is no other doctrine of government here; and no man imputes to another, and no man should claim for himself, any peculiar merit for asserting what every body knows to be true, and nobody denies. Why, where else can

we look but to the people for political power, in a popular government? We have no hereditary Executive, no hereditary branch of the Legislature, no inheritance of great masses of property, no system of entails, no long trusts, no long family settlements, no primogeniture. Every estate in the country, from the richest to the poorest, is divided among sons and daughters alike. Alienation is made as easy as possible; every where the transmissibility of property is made perfectly free; the whole system is arranged so as to produce, as far as unequal industry and enterprize render it possible, a universal equality among men—an equality of rights absolutely, and an equality of condition so far as the different characters of individuals will allow such equality to be produced. He who considers that there may be, is, or ever has been, since the Declaration of Independence, any body who looks to any other source of power in this country but the people, so as to give them peculiar merit who clamor loudest in its assertion, must be out of his mind even more than Don Quixote was. His imagination was only perverted. He saw things not as they were. He saw windmills, and took them to be armed men—knights on horseback. This was bad enough: but who ever says, or speaks as if he thought, that anybody looks to any other source of political power in this country but the people, must have a stronger and a wilder imagination; for he

> "—— gives to airy nothing,
> A local habitation and a name."

He "saws the air." He sees phantoms. Well, then, let all admit, what none deny, that the only source of political power in this country is the people. Let us admit that they are *sovereign*, for they are so; that is to say, the aggregate community, the collected will of the people, is sovereign. I confess that I think Chief Justice Jay spoke rather paradoxically, than philosophically, when he said that this country exhibited the extraordinary spectacle of many sovereigns and no subjects. The people, he said, are all sovereigns: and the peculiarity of the case is, that they have no subjects, except a few colored persons. This must be rather fanciful. The aggregate community is sovereign; but that is not *the* sovereignty which acts in the daily exercise of sovereign power. The people cannot act daily as the people. They must establish government, and invest it with so much of the sovereign power as the case requires; and this sovereign power being delegated and placed in the hands of the government, that government becomes what is properly called THE STATE. I like the old-fashioned way of stating things

as they are: and this is the true idea of a State. It is an organized government, representing the collected will of the people, so far as they see fit to invest that government with power. And, in that respect it is true, that though *this* government possesses sovereign power, it does not possess *all* sovereign power; and so the State governments, though sovereign in some respects, are not in all. Nor could it be shown that the powers of both as delegated, embrace the whole range of what might be called sovereign power. We usually speak of States as sovereign States. I do not object. But the Constitution never so styles them, nor does the Constitution speak of the government here, as the *general* or the *federal* government. It calls them the United States, and the government, the government of the United States; and it calls the State governments, State governments. Still the fact is undeniably so: legislation is a sovereign power, and is exercised by organized government to a certain extent, and by the States according to the forms which they have themselves established.

Well, then, having agreed that all power is originally from the people, that they can confer as much of it as they please, the next principle is, that, as the exercise of legislative power and the other powers of government by themselves, is impracticable, they must be exercised by REPRESENTATIVES of the people: and what distinguishes the American System as much as any thing else from any other political system of ancient or modern times, is the marvelous felicity of its representative system. It has, with us, allow me to say, a somewhat different origin from the representation of the Commons in England, though that has been worked up to some resemblance of our own system. The representative system in England originated not in any supposed rights of the people themselves, but in the necessities and commands of the Crown. At first, Knights and Burgesses were summoned to a Parliament called by the King, often against their will. Many remonstrances were presented against sending up these representatives: the charge of paying them was felt to be burdensome by the people. But the King wished their counsel and advice, and perhaps the presence of the popular body, to enable him to make greater headway against the feudal Barons in the aristocratic and hereditary branch of the Legislature. In process of time, these Knights and Burgesses assumed more and more a popular character, and became the guardians of popular rights. The people through them obtained protection against the encroachments of the Crown and aristocracy, till in our day

they are understood to be the representatives of the people, charged with the protection of the rights of the people. With us it was always just so. Representation has always been this: The power is with the people; but they cannot exercise it in masses or *per capita:* they can only exercise it by their representatives. The whole system has been popular with us from the beginning.

Well, the basis of this representation is suffrage. The right to choose representatives is every man's part in the exercise of sovereign power—to have a voice in it, if he has the proper qualifications: that is the fundamental exercise of political power by every elector. That is the beginning. That is the mode in which power emanates from its source, and gets into the hands of Conventions, Legislatures, Courts of Law, and the Chair of the Executive. It begins in suffrage. Suffrage is the delegation of the power of an individual to some agent.

If this be so, then follow two other great principles of the American system:

1. The first is, that the right of suffrage shall be guarded, protected, secured against force and against fraud; and

2. The second is, that its exercise shall be prescribed by previous law; its qualifications shall be prescribed by previous law; the time and place of its exercise shall be prescribed by previous law; the manner of its exercise—under whose supervision—always sworn officers of the law, is to be prescribed. And then again the results are to be certified to the central power, by some certain rule, by some known public officers, in some clear and definite form, to the end that two things may be done: *first*, that every man, entitled to vote, may vote; *second*, that his vote may be sent forward and counted, and so he may exercise his part of sovereignty, in common with his fellow men.

In the exercise of political power through representatives, we know nothing, we never have known anything, but such an exercise as should be carried through the prescribed forms of law: and when we depart from that, we shall wander as widely from the American track as the pole is from the track of the sun.

I have said that it is one principle of the American System, that the people limit their governments, National and State. They do so; but it is another principle, equally true and certain, and according to my judgment of things equally important, that the people often *limit themselves;* they set bounds to their own power. They have chosen to secure the institutions they establish against the sudden

impulses of mere majorities. All our institutions teem with instances of this. It was their great conservative principle in constituting forms of government, that they should secure what they had established against sudden changes of mere majorities. By the fifth article of the Constitution of the United States, Congress, two thirds of both Houses concurring, may propose amendments to the Constitution, or on the application of the Legislatures of two thirds of the States, may call a Convention, and amendments proposed in either of these forms, must be ratified by the Legislatures or Conventions of three fourths of the States. That fifth article of the Constitution, if it was made a topic for those who framed the "People's Constitution" of Rhode Island, could only have been made a topic of denunciation. It gives no countenance to any of their proceedings, or to any thing like them. On the contrary, it is one remarkable instance of the enactment and application of that great American principle, that the Constitution of Government should be cautiously and prudently interfered with, and that changes should not ordinarily be begun and carried through by mere majorities.

But the people limit themselves also in other ways. They limit themselves in this first exercise of their political rights. They limit themselves by all their Constitutions, in two important respects—that is to say: in regard to the qualifications of *electors*, and in regard to qualifications of the *elected*. In every State, and in all the States, the people have precluded themselves from voting for any body they may choose; they have limited their own right of choosing. They have said, we will elect no man who has not such and such qualifications. We will not vote ourselves, unless we have such and such qualifications. They have also limited themselves to certain prescribed forms for the conduct of elections. They must vote at a particular place, at a particular time, and under particular conditions, or not at all. It is in these modes that we are to ascertain the will of the American people; and our Constitution and laws know no other mode. We are not to take the will of the people from public meetings, nor from tumultuous assemblies, nor from those assemblies of the people by which the timid are terrified, by which the prudent are alarmed, and by which society is disturbed. These are not American modes of signifying the will of the people, and they never were. If any thing in the country, not ascertained by a regular vote, by regular returns, and by regular representation, has been established, it is an exception, and not the rule; it is an anomaly, which I believe cannot be found. It is true, that at the

Revolution, when all government was immediately dissolved, the people got together, and what did they do? Did they exercise sovereign power? They began an inceptive organization, the object of which was to get together representatives of the people, who should form a government. This was the mode of proceeding in those States where their Legislatures were dissolved. It was much like that had in England upon the abdication of James the Second. He ran away—abdicated. He threw the great seal into the Thames. I am not aware, that on the 4th of May 1842, any great seal was thrown into Providence River! But James abdicated, and King William took the government; and how did he proceed? Why, he at once requested all who had been members of the old Parliament, of any regular Parliament in the time of Charles the Second, to assemble. The Peers, being a standing body, could, of course, assemble; and all they did was to recommend the calling of a Convention, to be chosen by the same electors, and composed of the same numbers as composed a Parliament. And the Convention assembled, and, as all know, was turned into a Parliament. This was a case of necessity—a revolution. Don't we call it so? And why? Not merely because a new sovereign then ascended the throne of the Stuarts, but because there was a change in the organization of the government. The succession of law was broken. The Convention did not assemble under any preceding law. There was a *hiatus*, a syncope, in the action of the body politic. This was a revolution, and the Parliaments that assembled afterwards dated their legal origin to that revolution.

Is it not obvious enough that men cannot get together, and count themselves, and say they are so many hundreds and so many thousands, and judge of their own qualifications, and call themselves the people, and set up a government. Why another set of men, forty miles off, on the same day, with the same propriety, with as good qualifications and in as large numbers, may meet and set up a government for themselves: one may meet at Newport, and another at Chepachet, and both may call themselves the people. What is this but anarchy? What liberty is there here but a tumultuary, tempestuous, violent, stormy liberty—a sort of South American liberty, without power, except in spasms—a liberty supported by arms to-day, crushed by arms to-morrow. Is that *our* liberty?

This regular action of popular power, on the other hand, places upon public liberty the most beautiful face that ever adorned that angel form. All is regular and harmonious in its features, and gentle in its operation. The stream of public authority under American

liberty, running in this channel, has the strength of the Missouri, while its waters are as transparent as those of a crystal lake. It is powerful for good. It produces no tumult, no violence, no wrong. It is well enough described in those lines of Sir Thomas Denman: it is a stream

> "Though deep, yet clear—though gentle, yet not dull;
> Strong without rage, without o'erflowing, full."

Another American principle growing out of this, and just as important and as well settled, as is the great truth that the people are the source of power, is, that when in the course of events it becomes necessary to ascertain the will of the people on a new exigency, or a new state of things or of opinion, the Legislative power provides for that ascertainment by an ordinary act of legislation. Has not that been our whole history? It would take me from now till the sun shall go down, to advert to all the instances of it; and I shall only refer to the most prominent and especially to the establishment of the Constitution under which you sit. The old Congress, upon the suggestion of the Delegates who assembled at Annapolis in May, 1786, recommended to the States that they should send Delegates to a Convention to be holden at Philadelphia, to form a Constitution. No article of the old Confederation gave them power to do this. But they did it, and the States did appoint Delegates, who went to Philadelphia, and formed the Constitution. It was communicated to the old Congress, and that body recommended to the States to make provision for calling the people together to act upon its adoption. Was not that exactly the case of passing a law to ascertain the will of the people in a new exigency? And this method was adopted without opposition, nobody suggesting that there could be any other mode of ascertaining the will of the people.

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In the next place, may it please your honors, it becomes very important to consider what bearing the Constitution and laws of the United States have upon the Rhode Island question. Of course the Constitution of the United States recognizes the existence of States. One branch of the Legislature of the United States is composed of Senators appointed by the States, in their State capacities. The Constitution of the United States, (Art. iv., § 4,) says that "the United States shall guarantee to each State a republican form of government; and shall protect the several States against invasion, and on the application of the Legislature, or of the Executive when the Legislature cannot be convened, against domestic vio-

lence." Now I cannot but think this a very stringent article, drawing after it the most important consequences, and all *good* consequences. The Constitution, in the section cited speaks of States having existing Legislatures and existing Executives; and it speaks of cases in which violence is practised or threatened against the State—"domestic violence;" and it says the State shall be protected. It says then, does it not, that the existing government of a State shall be protected? My adversary says, if so, and if the Legislature would not call a Convention, and if, when the people rise to make a Constitution, the United States step in and prohibit them, why the rights and privileges of the people are checked—controlled. Undoubtedly! The Constitution does not proceed on the *ground* of revolution: it does not proceed on any *right* of revolution; but it does go on the idea that within and under the Constitution, no new Constitution can be established in any State without the authority of the existing government. This cannot help the gentleman's argument much, because his own case falls within the same range. He has proved, he thinks, that there was an existing government, a paper government at least—a rightful government, as he alleges. Suppose it to be rightful. Suppose three-fourths of the people of Rhode Island to have been engaged in it and ready to sustain it. What then? How is it to be done without the consent of the existing government? Because if that government holds on and will not surrender till displaced by force, and if it is threatened by force, then the case of the Constitution arises, and the United States must aid the government that is in, because an attempt to displace a government by force is "domestic violence." It is the case provided for by the Constitution. If the existing government hold on, maintain its post, though three fourths of the State have adopted the new Constitution—is it not evident enough that the exigency arises in which the Constitutional power here must go to the aid of the existing government? Look at the law of 28th February, 1795—in Vol. I. of the Statutes at Large, page 424: "and in case of insurrection against any State, or *against the Government thereof*, it shall be lawful for the President, on application of the Legislature, to call out the militia of other States as he may judge sufficient to suppress such insurrection." Insurrection against the *existing* government is to be suppressed.

But the law and the Constitution, the whole system of American institutions, do not contemplate a case as likely to arise under our system, in which a resort will be necessary to proceedings *aliunde*,

or outside of the law and the Constitution, for the purpose of mending a Constitution. It goes on the ground that the States are all republican, that they are all representative in their forms, and that these popular governments in each State, the annually created creatures of the people, will give all proper facilities and necessary aids to bring about changes that the people may judge necessary in their Constitutions. It takes that ground, and acts on no other supposition. It assumes that the popular will will be accomplished in all particulars. And history has proved that the presumption is well founded.

Now this is the view I take of what I have called the American System. These are the methods of bringing about changes in government.

Now it is proper to look into this record and see what the questions are, that are presented by it, and consider,

1. Whether the case is one for judicial investigation at all—that is, whether this Court can try the matters which the plaintiff has offered to prove in the Circuit Court below: and

2. In the second place, whether many things which he did offer to prove, if they could have been and had been proved were not acts of criminality, and therefore no justification, and

3. Whether all that was offered to be proved would show that, in point of fact, there had been established and put in operation any New Constitution to displace the Old Charter government of Rhode Island.

The declaration is in trespass. The writ was issued on the 8th of October, 1842, in which *Martin Luther* complains that *Luther Borden* and others broke into his house in Warren, Rhode Island, on the 29th of June, 1842, and disturbed his family, &c.

The defendant answers that large numbers of men, in arms in Rhode Island for the purpose of overthrowing the government of the State, made war upon it: that for the preservation of the government and people, martial law had been proclaimed by the Governor, under an act of the Legislature on the 25th of June, 1842. The plea goes on to aver that the plaintiff was aiding and abetting the attempt to overthrow the government, and that the defendant was under the military authority of John T. Child, and was ordered to arrest the plaintiff, for which purpose he applied at the door of his house, and being refused, he forced the door.

The action is for trespass, and the plea is justification under the law of Rhode Island. The plea and replications are as usual in

such cases. The plea was filed at the November term of 1842, and the case was tried at the November term of 1843, in the Circuit Court in Rhode Island. And in order to make out a defence, the defendant offered the Charter of Rhode Island, the participation of the State in the Declaration of Independence, its uniting with the Confederation in '78, its admission into the Union in '90, its continuance in the Union, and its continued recognition as a State down to May, 1843, when the Constitution now inforce was adopted. And here let it be particularly remarked that Congress admitted Rhode Island into the Constitution under this identical old Charter government, thereby giving sanction to it as a republican form of government. And the defendant then refers to all the laws and proceedings of the Assembly till the adoption of the present Constitution of Rhode Island. The defendant proposes to prove that large numbers of men were assembled in arms to destroy the government, that he was acting under competent military authority in resisting them, &c. as set forth in the plea. To repel the case of the defendant, the plaintiff read the proceedings of the old Legislature, and documents to show that the idea of changing the government had been entertained as long ago as in 1790. He read also resolutions of the Assembly of 1841—memorials praying changes in the Constitution, &c., &c. He next offered to prove that suffrage associations were formed throughout the State in 1840 and '41; that steps were taken by them for holding public meetings, and to show the proceedings held thereon. In the next place, a Mass Convention was held at Newport, attended by over four thousand persons, and another at Providence, which over six thousand attended, at which resolutions were passed, which were here offered. Then he offered to prove the election of Delegates—the meeting of the Convention in October, 1841, and the drafting of a Constitution; the re-assembling in 1841, the completion of the draft, its submission to the people, their votes upon it, its adoption, and the proclamation on the 13th day of January, 1842, that the Constitution so adopted was the law of the land.

That is the substance of what is here averred. The plaintiff next offered to prove that the Constitution was adopted by a large majority of the qualified voters of the State; that officers were selected under it in April, 1842; that the new government assembled on the 3d of May, and he offered a copy of its proceedings.

He sets forth that the Court refused to admit the testimony upon these subjects, and ruled that the government and law of the State

were in full force, and that they justified the action of the defendants.

I will give a few references to other proceedings of this new government. The new Constitution was proclaimed on the 13th of January, 1842. On the 13th of April, officers were appointed under it, and Mr. Dorr was chosen Governor. On Tuesday, the 3d day of May, the new Legislature met, was organized, and then, it is insisted, the new Constitution became the law of the land—on that 3d day of May. The Legislature sat through that whole day, morning and evening; adjourned; met the next day, and sat through all that day, morning and evening, and did a great deal of paper business. It went through the forms of choosing a Supreme Court, &c. and on the evening of the 4th of May, it adjourned, to meet again on the 1st Monday of July, in Providence,

"And never word spake more!"

It never re-assembled. This government, then, whatever it was, came into existence on the *third* day of May, and went out of existence on the *fourth* day of May.

I will now give some references concerning the new Constitution authorized by the government. The present Constitution was framed in November, 1842. It was voted upon by the people on the 21st, 22d, and 23d days of November, was then accepted, and became by its own provisions the Constitution of Rhode Island on the first Tuesday of May, 1843.

Now what, in the mean time, had become of Mr. Dorr's government? According to their own principle, they say they are forced to admit that it was superseded by the new government, because the people had accepted the new government. But they had no new government till May, 1843. According to them, then, there was an interregnum of a whole year. If they had a government, what became of it? If it ever came in, what put it out of existence? Why did it not meet on the day to which it had adjourned? It was not displaced by the new Constitution, because that had not been agreed upon in Convention till November: it was not adopted by the people till the last of November, and it did not go into operation till May. What became of it?

I think it is important to note, that the new Constitution, established according to the prescribed forms, came thus into operation in May, 1843, and was admitted by all to be the Constitution of the State. What then happened in the State of Rhode Island? I do not mean to go through with all the trials that were had after this

ephemeral government had disappeared; but I will ask attention to the report of the trial of Dorr for treason, which took place in 1844, before the whole Court. He was indicted in August, 1842, and the trial came on in March, 1844. The indictment was found while the Charter government was in force, and the trial was had under the new Constitution of the State. He was found guilty of treason. * * * * * *

Having thus attempted to state the questions as they arise, and having referred to what has taken place in Rhode Island, I shall present what farther I have say in three propositions:

1. I say, first, that the matters offered to be proved by the plaintiff in the Court below, are not of judicial cognizance; and proof of them, therefore, was properly rejected by the Court.

2. If all these matters could be, and had been legally proved, they would have constituted no defence, because they show nothing but an *illegal* attempt to overthrow the government of Rhode Island.

3. No proof was offered by the plaintiff to show that, in fact, another government had gone into operation, by which the Charter government had been displaced.

And first, these matters are not of judicial cognizance. Does this need arguing? Are the various matters of fact alleged, the assembly of meetings, the appointment of committees, the qualifications of voters,—is there any one of all these matters, of which a Court at law can take cognisance, in a question where they are to decide on sovereignty? The thing to be proved is a change of the sovereign power. Two Legislatures existed at the same time, both claiming power to pass laws. Both cannot have a legal existence. What then is the attempt of our adversaries? To put down one sovereign government, and to put another up, by facts and proceedings in regard to elections out of doors, unauthorized by any law whatsoever. Regular proceedings for a change of government may in some cases, perhaps, be taken notice of by a Court, but this Court must look elsewhere than out of doors, and to public meetings, irregular and unauthorized, for the decision of such a question as this. It naturally looks to that authority under which it sits here, to the provisions of the Constitution which have created this tribunal, and to the laws by which its proceedings are regulated. It must look to the acts of the government of the United States in its various branches.

This Rhode Island disturbance, as every body knows, was brought to the knowledge of the President of the United States by the public authorities of Rhode Island; and how did he treat it? The

United States have guarantied to each State a republican form of government. And a law of Congress has directed the President, in a Constitutional case requiring such action, to call out the militia to put down domestic violence and suppress insurrection. Well, then, application was made to the President of the United States. For according to our system, it devolves upon the Executive to determine, in the first instance, what are and what are not governments. The President recognizes governments, foreign governments as they appear from time to time in the occurrences of this changeful world. The Constitution and the laws make it his duty, if an insurrection exists against the government of any State, making it necessary to appear with an armed force—to call out the militia and put it down.

Two things may here be properly considered. The first is, that the Constitution declares that the United States shall protect every State against domestic violence; and the law of '95, making provision for carrying this Constitutional duty into effect in all proper cases, declares, that "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States to call out the militia of other States to suppress such insurrection." These Constitutional and legal provisions make it the indispensable duty of the President to decide, in cases of commotion, what is the rightful government of the State. He cannot avoid such decision. And in this case he decided of course that the existing government, the Charter government, was the rightful government.

In the next place, if events had made it necessary to call out the militia, and the officers and soldiers of such militia, in protecting the existing government, had done precisely what the defendants in this case did, could an action have been maintained against them?

In reply to the requisition of the Governor, the President stated that he did not think that it was yet time for the application of force: but he wrote a letter to the Secretary of War, in which he is directed to confer with the Governor of Rhode Island, and whenever it should appear to them proper, to call out from Massachusetts and Connecticut a militia force sufficient to *terminate at once* the insurrection in Rhode Island. We are at no loss to know how the Executive government treated the insurrection in Rhode Island. It was regarded *as to be put down.* That is manifest from the President's letters to the Secretary of War, and to Governor King.

Now the eye of this Court must be directed to the proceedings of the General government, which had its attention called to the sub-

ject, and which did institute proceedings respecting it. And the Court will learn from the proceedings of the Executive branch of the government, and of the two Chambers above us, how the disturbances in Rhode Island were regarded—whether they were looked upon as the establishment of any government, or as a mere, pure unauthorized, unqualified *insurrection* against the authority of the existing government of the State.

I say, therefore, that, upon that ground, these facts are not facts which this Court can inquire into, or which the Court below could try, because they are facts going to prove (if they prove anything) the establishment of a new Sovereignty, and that is a question to be settled elsewhere and otherwise. From the very nature of the case, it is not a question to be decided by judicial inquiry. Take for example one of the points which it involves: My adversary offered to prove that the Constitution was adopted by a majority of the people of Rhode Island—by a large majority, as he alleges. What does this offer call on your honors to do? Why, to ascertain, by proof, what is the number of citizens in Rhode Island; and how many attended the meetings at which delegates to the Convention were elected; and then you have got to add them all up, and prove by testimony the qualifications of every one of them to be an elector. It is enough to state such a proposition to show its absurdity. As none such ever was sustained in a court of law, so none such can be or ought to be sustained. Observe that *minutes* of proceedings can be no proof, for they were made by no authentic persons, registers were kept by no warranted officers. Chairmen and Moderators were chosen without authority. In short, there are no *official* records—there is no testimony in the case but parole. I think that Chief Justice Durfee was right in his interpretation of the law.

But, again, I say you cannot look into the facts attempted to be proved, because of the certainty of the continuance of the old government till the legal Constitution went into effect on the 3d of May, 1842. To prove that there was another Constitution of two days' length, would be absurd. And I say that the decision of Rhode Island herself by her Legislature, by her Executive, by the adjudication of her highest Court of law, on the trial of Dorr, has shut up the whole case. Do you propose—I will not put it in that form—but would it be proper for this Court to reverse that opinion? That declares that the Judges of Rhode Island know nothing of

the "People's Constitution;" is it possible then for this Court, or for the Court below, to know of it?

It appears to me, that if there were nothing else in the case, the proceedings of Rhode Island herself must shut every body's mouth in the Court and out of it. Rhode Island is competent to decide the question herself, and every body else ought to be bound by her decision.

And it is but a breach of this to say, according to my second proposition—

2. That if every thing offered had been proved; if, in the nature of the case, these facts and proceedings could have been received as proof, the Court could not have listened to them, because every one of them is regarded by the State in which they took place as a *criminal* act. Who can derive any thing from acts declared to be criminal? The very proceedings which are now set up here show that the new Constitution was founded upon acts which the Legislature of the State had provided punishment for, and which the Courts of the State have punished. All, therefore, which the plaintiff has attempted to prove here, are acts which he was not allowed to prove, because they were criminal in themselves, and have been so treated and punished, so far as the State government in its discretion, thought proper.

3. Thirdly and lastly, I say that there is no evidence offered, nor has any distinct allegation been made, that there was an actual government established and put in operation to displace the Charter government. That is evident enough. You find the whole embraced in those two days, the third and fourth of May. The French Revolution was thought to be somewhat rapid. That took *three* days. But this work was accomplished in two. It is all there and what is it? Why they vote A. Treasurer, and C. Secretary, and Mr. Dorr, Governor; and choose officers of the Supreme Court. But did ever any man under that authority attempt to exercise a particle of official power? Did any man ever bring a suit? Did ever an officer make an arrest? Did any action proceed from any member of the government, or from any agent of it, to touch a citizen of Rhode Island in his safety or his property, so as to make the party answerable upon an indictment or in a civil suit? Never. It never performed one single act of government—it never did a thing in the world! All was patriotism and all was paper: and with patriotism and with paper it went out on the 4th of May, admitting itself to be, as all must regard it, a contemptible *sham!*

I have now done with the principles involved in this case.

MORALITY AND LAW.

[By A. D. Coombs.]

There existed in Cincinnati, in times past, an association of individuals, who were called the "Mechanics and Traders Bank." This association engaged in the business of banking, not only without authority by charter, but in direct violation of an express law. Notwithstanding this, the Legislature of Ohio were prevailed on, in the year 1845, to authorize this bank to sue its debtors in the name of a trustee, who is named in the act, and declare that such debtors should not plead or allege the unlawfulness of their contracts. By the laws in being at the time these contracts were entered into, they were not legal or binding obligations. If they ever became so, it was by virtue and in consequence of the special law of 1845. I propose now to examine the question whether those men who became indebted to this unlawful institution, were under any "moral obligation" to make payment. If they were, then, and not otherwise, I admit the validity and constitutionality of a retrospective law to enforce such payment.

Were those men, who promised under these circumstances to pay money to the Mechanics and Traders' Bank, under any obligation to do so? Undoubtedly it was wrong to make such a promise; for it was a promise to violate the law, or to aid a band of men in such a violation. Every one will see that a promise to violate the law in the commission of crime, would carry with it no obligation. The offence would consist in making the promise, not in refusing to carry it into execution. And, if we are disposed to make a wide difference in favor of laws which prohibit crimes, so called, over those which prohibit other hurtful acts, it is because we have not a sufficiently high respect for the law itself, as a positive institution. All men are interested in the preservation of the law; but all are not capable of understanding its reason or policy. The law must therefore be respected for its own sake, for itself, because it is the law. A promise to aid men in its deliberate infraction can never carry with it any binding obligation.

It is difficult to set aside the idea of the vast importance of money transactions. In this day of commercial cupidity, a pecuniary obligation is exalted in the common estimation above the laws of the land, and above all other obligations. Instead of being the root of

all evil, money is deemed to be the essence of all good: it is the substance of things hoped for, and the evidence of things unseen. But, however tenaciously our affections may cling to such objects, our understandings will instruct us that there are other things to be considered of far higher and greater importance. Courts, which, according to Alexander Hamilton, have judgment, and no will, ought never to be persuaded that any earthly thing is entitled to higher consideration than the law itself. If inferior obligations come in conflict with the law, they should fall to the ground and crumble into dust.

We are prone to think, and the doctrine is sometimes openly proclaimed, that the *individual man is greater than the law.* It is a false doctrine, full of evil. The law is made for individuals; but in order that all may enjoy its advantages, each one must be subordinate to it—must conform to and respect its obligations. The law is superior to man in the exact proportion that the welfare of all men is more important than that of individuals. In this country, the law-making power is not composed of men separate from the rest of the community. The law itself is not to be regarded as an institution having no connexion with the citizen. Each man is a recipient of its benefits, and is protected by its power. As each man has a property in it, so is he conjoined to it; and it is his duty, as it should be his pleasure, to uphold it—to aid and support in vindicating and sustaining its authority.

By a case reported in 16 *Ohio Rep.*, recently published, it appears that the act of 1845 has been the subject of judicial investigation. The Court proclaimed doctrines equivalent to renouncing the independence, if not the separate existence of the judiciary department. I think the act should have been pronounced void, because it is contrary to the provision of the Constitution of the United States, declaring that "no State shall pass any bill of attainder, *ex post facto law*, or law impairing the obligation of contracts." I know that it has been frequently held, notwithstanding this prohibition, that a retrospective law, not being *ex post facto* in its character, is not prohibited by any part of the Constitution. But the principle to be deduced from the various cases is, that such a law must have reference to obligations previously existing between the parties to be affected by it. The Legislature may create a contract, or make a void contract valid, to give effect to a pre-existing obligation; but they cannot create the obligation itself. All the reason upon which the prohibition against laws impairing the obligation of contracts is

founded, applies with full force against the arbitrary power of creating such obligations. Without such an application, the prohibition itself would be no defence to the citizen, no bulwark whatever against tyranny. Yet our Court have declared that they will never consent to find such an act void, unless it is palpably against the "*letter* and spirit" of the Constitution.

I would here remark, that Judge Hitchcock, who delivered the opinion of the Court in this case, seemed to be greatly influenced by the impression that the act would enure to the benefit of the creditors of the bank, who were not stockholders. "It is a law," says he, "peculiarly for the benefit of creditors." But this was altogether a mistake. It does not appear that there were any creditors, who were not also stockholders: and if there were any such, they did not need the assistance of any special law. They were authorized by the 12th section of the Act of 1816 to bring suit and recover judgment against any one or all of the stockholders. A suit *was* thus brought and sustained in a similar case at the very same term of the Court, in the case of *Johnson* v. *Bently and others.*

It is well established, that an act is not unconstitutional merely because it is retrospective. If the Legislature limits itself to curing defects, correcting mistakes, and providing *remedies*, it cannot be charged with transcending its authority.

The law of 1835, the "healing act," is undoubtedly constitutional, and the wonder now is that there could have been any doubt about it. It had been held that the wife's deed did not divest her of her estate in land, unless the magistrate's certificate of her acknowledgment contained the fact that the deed had been read, or its contents made known to her. The "healing act" declared that the conveyance should be deemed perfect, though the certificate contained no such statement. It gave to the deed the effect which the party signing it intended it should have. It did not create or impair any obligation, but cured a defect in form for the purpose of legalizing and confirming an obligation already existing. It enforced rights, and these rights were not acquired by any contract or act contrary to public policy, or the law of the land.

There is a solecism in the idea that *rights* can be acquired in any manner or by any act contrary to law. The law is itself a rule of right. It is the rule which has been established by the reason of the public, by which men have consented that their passions shall be governed—the only one which Courts can properly recognize. There can be no uniform decisions dispensing "equal justice to

all," except in accordance with this rule. If we depart from or disregard it, we find ourselves at sea, tossed to and fro, rolling hither and thither, having no chart or compass.

The act is objectionable for other reasons besides those already specified. It is not a general law in form, or in the purpose of its application. It is a special act, "deciding rights which should have been left to the judiciary controversy." It is an instance of one part of the government assuming the offices of another—of the Legislature encroaching upon and exercising judicial functions. And the power is more odious from the manner of its assumption. The act is granted upon the separate application of the favored party. It is true, he is directed to go before a Court; but his adversary is not permitted to set up the unlawfulness of the contract upon which the suit is founded. In effect, A B, free of debt, is made a debtor merely by an act declaring him to be so. The Court simply register the decision of the Legislature. The citizen, happy man! has guarantied to him the form and ceremony of a trial, but is prohibited from making any defence. Great blessing! He is permitted to appear before a Court, and have his name recorded as a victim of power.

What follows is a summary of the whole subject. We have a law prohibiting the circulation of unauthorized bank paper. It is a penal offence to engage in such business. Every person who serves as an officer or trustee of an unauthorized bank is liable to a heavy penalty. This law is twenty-two years old, having stood the test of time, and been sanctioned by the public judgment. An association of individuals band together in direct violation of its plainest provisions. They embark in the business of banking under the attractive and high sounding name of the "Mechanics and Traders Bank." For a time they go on smoothly, but the association ultimately fail. Do they flee from sight, or hide their heads in shame? Baffled in their unlawful schemes, they call upon that power whose authority they had despised and trampled under foot. With audacity unexampled, they ask for a special law to perfect their iniquitous plans, to save themselves from sinking. The Legislature give them all they ask, and confirm their own humiliation. The Court then stamp the whole proceeding with the seal of their approbation: they sustain the special act, and declare that those who were privy to the original wrong were under a "moral obligation" to continue in that wrong—were bound to be faithful, not in their allegiance to the law, but to a promise to aid in its violation. By such a strange

judicial decision is this rickety and disjointed legislation sustained. After this manner are the laws violated with impunity by the assistance of the Legislature and the sanction of the Court. Such proceedings neither win public confidence nor deserve approval.

SUPREME COURT OF OHIO: MUSKINGUM COUNTY, NOV. TERM, 1847.
IN CHANCERY.

[BEFORE C. J. BIRCHARD AND JUDGE HITCHCOCK.]

ANNE WARD *v.* HUDSON WARD AND OTHERS.

BILL. The petition sets forth that complainant is the widow of Dr. J. B. Ward, deceased, and his sole devisee. A copy of the will is annexed to the bill. He died in 1843. She never made her election to take under his will, known to the Court of Common Pleas, and prays to be permitted now to do it. She and her husband were English people, ignorant of our laws. She had no suspicion that her title was imperfect until within a month. The defendants are her infant children—those who are age of being willing that she should take under the will.

ANSWER. Defendants being infants, answer by guardian *ad litem.*

EVIDENCE. William D. Ward's deposition proves the facts set forth in the bill.

GODDARD & EASTMAN for complainant.

We cannot learn that the question presented in this case has yet been decided in our Courts.

We have the relief prayed for upon two grounds. *First*, the ignorance of complainant that any such step was required to perfect her election; and *secondly*, the general doctrine that time is not, in the view of a Court of Equity, of absolute importance, provided the rights of all persons remain the same.

1. We do not intend to enter at large upon the much vexed question whether relief can be given against a mistake of law. No one can read the fifth chapter of Mr. Justice Story's treatise upon Equity Jurisprudence, without discovering that such relief has been repeatedly granted, whatever may be the attempts made to disguise it. The matter is settled upon great consideration by our own Court: we refer to *Evarts* v. *Strode's heirs*, 11 *O. R.* 480.

The case now before the Court can, however, hardly be said to require the application of this principle. Mrs. Ward omitted to do an act within the time, which it is said the law requires. Nothing has intervened to change the rights of parties. If the act is done now, every thing will be in the same situation in which it would be had the act been done four years ago, and she asks permission to do it now. This leads to the second head of our inquiry.

2. The forty-fifth section of the Act relating to Wills, requires a widow to elect within six months, whether she will take by the will or be endowed. The forty-sixth section requires this election to be made known to the County Common Pleas, and entered upon the minutes.

When a man leaves all his property to his widow, why should she be required to *elect* at all? What is she to elect or choose between? By the terms of the forty-fifth section, if it plainly appears that the husband intended that she should hold by the will, and also be endowed, she may have both: that is, she need not elect at all. Is this case stronger than that where the husband leaves every thing to his wife?

The forty-fifth section says that the election shall be made in six months—the forty-sixth, that it shall be entered on the minutes of the Court; but it does not say *when* this entry shall be made. By the forty-sixth section, the consequence of *failing to make an election* gives the widow her dower and distribution share. No consequence is in terms attached to a failure to *record the election*. If this be thought too nice a criticism of the Statute, it must at all events be admitted that the provision was designed for the benefit of the widow, and not for her injury, and that such construction be given the statute as will effect that object, the rights of no other persons being impaired.

Suppose that the Statute in terms required the election to be recorded in six months—will an omission to observe this ceremony within this time operate a forfeiture of the estate?

The Statute expressly says, that mortgages shall take effect from the time they are presented for record; but the Courts say, that for some purposes, and as against the mortgagor, they shall take effect from delivery.

The Statute of Frauds provides, that all grants made with intent to defraud creditors, shall be deemed utterly void and of no effect; but the Courts say the deed is not utterly void—it is good as against the grantor.

The Statute of Frauds provides that no action shall be brought upon a contract concerning lands, unless in writing. The Courts say that under certain circumstances, (part performance, &c.) the action may be brought, though this form enjoined by law has not been complied with.

The Statutes of many of the States require deeds to be recorded within a certain period, without containing the clause to be found in our Statute as to subsequent purchasers without notice; yet the judicial construction uniformly is, that a record after the Statute period is good, except as to subsequent purchasers without notice.

There are two cases in the Ohio Reports, and one unreported case, decided upon the Circuit, which should be brought to the attention of the Court in the consideration of this case.

The unreported case was a bill filed by the widow of the late Benjamin S. Brown, Esq. of Knox county, against the executors, heirs, and creditors of her husband, and was decided in the Supreme Court, September term, 184–. The bill set forth that by the will of her husband, certain property was devised to her which she supposed would be a more ample provision than that given by statute, and she elected to take under the will, and caused her election to be recorded in the Court of Common Pleas of Knox county, within six months from the probate of the will. After the six months had elapsed, she discovered that her husband's estate was much involved, and she desired to change her election, for which object the bill was filed. The case was carefully considered by the Supreme Court, and the relief granted.

Shotwell & wife v. *Sedam's heirs*, 3 *O. R.* 5, arose under the act of 1831, which required an election only when the devise was expressed to be in lieu of dower; but that difference is not material. The Court thought it a nice question, whether Mrs. Shotwell (Sedam's widow) was barred of her dower by the will, and they did not decide it. She did not elect within the six months, and never made her election a matter of record, but she did certain acts *in pais* which the Court held to bar her dower, and throw her upon the will alone as effectually as if she had made an election within the Statute period, and had it recorded upon the minutes of the Court. She and her new husband were seeking dower, and the Court held her barred. Suppose we reverse the case, and that they were seeking to establish her rights under the will, and Cornelius Sedam was opposing it—will the Court say that a different rule would prevail. Certainly not.

Stilly & Wife v. *Folger and others*, 14 *O. R.* 610, remains to be considered. The marginal note is—"The election of a widow to take under the will of her husband, to bar her of dower, must be made in the Court of Common Pleas, within six months after probate of the will."

The great question in the case was, whether a certain ante-nuptial agreement would bar Richard Folger's widow from claiming dower in his estate. The case states, page 610—"This claim of dower was admitted to be valid unless barred by the agreement," (the ante-nuptial agreement.) Folger's will is also set up, in which he devises to her that which by the agreement he had stipulated should be hers upon survivorship. Not a word is said in the statement as to whether she elected to take under the will or not. The first we hear of that is in the argument of the counsel for complainants, who say, page 611: "The widow elected to take at law, and not under the will; the contrary is not seriously asserted on the part of the defendants. The filing of the petition in this case within twenty days after the death of her husband, is conclusive of this fact." Nothing further occurs in the case about the election until we come to the argument of the counsel for the defendants, page 624; and they submit that matter to the Court without argument. We gather from what they say, that depositions were taken proving certain matters in connection with her election; but what they were does not appear until we come to the opinion of the Court, page 646. Judge Wood adverts to this evidence, from which it appears that immediately after her husband's death, she received most of the property devised to her, but declared her intention to claim dower. The learned Judge proceeds to say, that no evidence is competent to prove an election to take under the will, but the evidence o' an entry upon the minutes of the Common Pleas; but nothing is said as to the period within which that record must be made—nothing on the question whether a Court of Equity may permit it to be done after the lapse of the six months. In a word, every thing now presented to the Court in the case before them, is intact by that decision.

And now is there any thing in the Statute which limits the period of making this election known to the Court, or which limits the period within which the entry shall be made upon the minutes? By section 45, the widow has six months within which to make her election. By section 46, the election is required to be made known to the Court, and entered upon the minutes: Then follow these

words: "and if the widow fail to make such election, she shall retain her dower," &c. How easy would it have been for the Legislature to have said—"and if the widow fail to make such election, and to cause the same to be entered on the minutes of the Court within six months after probate of the will, she shall retain her dower," &c. But this is not said.

Again: six months are allowed by section 45 for the election. She has the *full period* to inform herself as to the situation of her husband's property, that she may act with a full understanding of her rights; and in many cases the time would be too short for this purpose—in most, doubtless it would be ample. Now if she has the full period of six months within which to make the election, it cannot be abridged by taking any part of it to apply to the purpose of making her election known and having it recorded. Besides, there may be no term of the Court held within the six months. The special term allowed by section 245, page 384, does not embrace it. In Coshocton county, there has been for years one vacation of more than six months. Now suppose a will to be proved in September, on the last day of the September term. Court does not sit again until April. Is the wife deprived of her rights under her husband's will? No one would venture to answer that question in the affirmative.

The true construction would then seem to be, that this election of the widow should be made matter of record at some convenient period after the expiration of six months; and if made before any one is prejudiced by its omission, it will suffice.

In searching as to titles, there will be no difficulty. The clerk will post the entry of the election in his Administration docket, and then it would be searched for. One would no more turn over the the leaves of the journal for the period of six months next following the probate of a will, to find a widow's election, than he would the records of deeds. The index is resorted to in both cases.

This doctrine of election has not originated with the Ohio Statute. It exists in England, and in several States of the Union, and has grown up with the enlarged and enlarging jurisdiction of Courts of Chancery, and is so moulded by them as to subserve in all cases the purposes of justice and equity. In *Brice* v. *Brice*, 2 *Molloy* 21, Sir Anthony Hart, Lord Chancellor of Ireland, refers to a case decided by Sir William Grant, in which he held, that to make an election binding by lapse of time or long acquiescence, "*injury would now arise to third persons* from rescinding it, and that it would be impos-

sible to place them, except in a much worse condition than they would have been, if the party had elected early," and secondly, "that *he knew he had a right to elect;* that is, not only knew the existence of the instrument, but the consequences of it on his rights."

Upon the whole, therefore, although in obedience to the Statute we may be required to say that the election shall be made within six months, yet, as the Statute is not imperative as to the period at which the election shall be recorded, may we not say that it shall be good if recorded at any time when the other parties will be in no worse condition than if the election had been made earlier, and especially, when the party asking to have her election recorded comes into a Court of Equity, and shows that a failure earlier to record the election arises from her ignorance of her rights.

By the Court. The Court entered a decree for complainant.

SUPREME COURT OF OHIO: GALLIA COUNTY, MARCH TERM, 1846, AND APRIL TERM, 1848.

John Norman *v.* Joseph K. Will.

Money paid under a mistake of facts, can be recovered back. Such mistake consists in the *present belief* of the party paying the money, that it has not been previously paid.

Nor will a previous knowledge of the prior payment, or of facts which might put a party on inquiry, alter the case, if, through forgetfulness, or from other cause, he pays the money at the time, supposing that it had not previously been paid.

The declarations of the party made to one holding his note, between the times of the two payments, recognizing the note as a subsisting note, are admissible in favor of such party, to show that he believes the note not paid.

This was a writ of error to the Common Pleas of this county. The case below was assumpsit for money had and received. The bill of exceptions showed the following state of facts. John Norman was indebted to one John Newton, and in order to raise the money, borrowed of the Bank of Gallipolis, on the 22d October, 1839, $150, for which he gave his note at ninety days with John Newton and James Beard as security. When the note became due, or some time after, it was paid by Newton, and the note delivered to him. In the fall of 1840, Newton, as he was to be absent during the winter, handed this note to the Cashier of the Bank as a memorandum of the amount Norman was to pay in on a note held by the

Bank against Newton. In January the Bank failed, and the new Cashier, finding this note in the Bank, with its other discounted notes, and supposing from a conversation with Norman that it had not been paid, transferred the note to the defendant, Will, in redemption of the liabilities of the Bank. Will took the note to Norman, and he paid it by an order on the Bloom Furnace, which order was paid to Will. The object of this suit was to recover back the money so paid. It was proved by a witness that Norman had been told of the fact of Newton's having paid the note.

On this evidence the plaintiff asked the Court to instruct the jury, that if they should find that the plaintiff, at the time he paid said note to said defendant, honestly and *bona fide* believed that said note had not been previously paid by said Newton, then the plaintiff would have been entitled to recover of the defendant the amount so paid him—which instruction the Court refused to give; but the Court charged the jury, that if the plaintiff had been, previously to said payment, informed of the note having been paid by Newton, then he could not recover it back again. The Court also instructed the jury, that if Norman had knowledge of such facts as would put him upon inquiry as to the previous payment of said note, he could not recover—to all which rulings the plaintiff excepted. The verdict was for the defendant, and judgment thereupon—to reverse which, this writ of error was prosecuted.

Nash, for the plaintiff, insisted that the true test was to be found in the *present* knowledge of the party paying money. Was he laboring under a mistake at the time the payment was made? Mere forgetfulness cannot change his rights. 1 *Stephen N. P.* 347; *Kelley* v. *Solori*, 9 *M. & W.* 54; *Brom's Legal Maxims*, *Lucas* v. *Warswick*, *Moody & Robertson*, 293; *Norton* v. *Martin*, 15 *Maine Rep.* 45; 1 *Wend. Rep.* 185; *Bilbie* v. *Lumely* 2 *East Rep.* 419. Nor can a knowledge of facts, which might have put him on inquiry, alter the case. 1 *Wend. Rep.* 185; 20 *Wend. Rep.* 174; 6 *Mass. Rep.* 81; 12 *do.* 84; *Horn* v. *Nicholls*, 1 *Salk. Rep.* 289; 3 *M. & S.* 344; 9 *Mass. Rep.* 408.

Welch for defendant, cited, to sustain the instructions, the case of *Bilbie* v. *Lumely*, 2 *East. Rep.* 469, and especially the language of Mr. Justice Bailey; also 2 *East Rep.* 471.

Birchard, J. According to the instructions of the Court below, a man's rights would depend upon the strength of his memory. We do not think so. The true test is found in the instructions asked

by the plaintiff below. Did the party paying the money, at the time he so paid it, labor under a mistake as to the facts? Did he then suppose the note had not been previously paid? If he supposed it had not been paid, then he paid the money here sought to be recovered back under a mistake. Let the judgment be reversed.

This case was retried at the October term (1846) of the Common Pleas, and a verdict rendered for the plaintiff. A bill of exceptions was tendered by the defendant, and a writ of error presented by Will to reverse the judgment, which was heard at the April term (1848) of Supreme Court, before Read and Avery, Justices.

The bill of exceptions, after reciting the evidence as given above, stated that the defendant had given evidence tending to show that said money was not paid under any mistake, and that plaintiff had been informed of the previous payment of the note by Newton. Thereupon the plaintiff called the Cashier of the Bank, and offered to prove by him that after the payment of the note by Newton, and before the assignment to Will, the plaintiff called at the Bank, and stated that he was informed that the Bank was assigning its Bills Receivable in payment of its liabilities, and requested the Cashier not to assign his note; alleging as a reason that he had given the former Cashier a draft on Coopers, of Dayton, for collection, and that out of the proceeds of this draft, this note was to be paid. This draft was afterwards returned protested for nonpayment, and was handed with the note to Will. To the introduction of this evidence the defendant objected, but it was admitted; and this was assigned for error.

Welch, for Will, insisted that the *declarations* of a party were not evidence for himself.

Nash, for Norman, referred to 2 *Cowen, Phillips' Ev.* 592; *Rex v. Smith*, 5 *Carr & Payne* 201; *Schenck* v. *Hutchinson*, 2 *N. Car. Law Rep.* 432; *Tompkins* v. *Saltmarsh*, 14 *Serg. and Rawle* 275.

The Court held the evidence admissible on these authorities, and affirmed the judgment.

SUPREME COURT OF OHIO: WASHINGTON COUNTY, APRIL TERM, 1848.

[BEFORE READ AND AVERY, JUSTICES.]

HEARN ET AL. *v.* THE STATE OF OHIO.

It is error to take judgment as by default at the return term of a writ of *scire facias*. The defendant in such case is entitled to a rule to plead before judgment.

THE case below was a writ of *scire facias*, issued against the plaintiffs in error, upon a recognizance given by Hearn as principal, and the others as defendants, conditioned for the appearance of said Hearn, to answer unto the State on an indictment for perjury. The record showed that Hearn failed to appear; that the recognizance was duly forfeited; that a *scire facias* was issued at the same term, returned served, and judgment thereupon rendered.

READ, J. We hold that this judgment must be reversed. The record shows that judgment was taken on default at the return term of the *scire facias*. No rule was taken upon the defendant to plead, and the case was never permitted to go to rules, like other cases. We think the case should have gone to the regular rules, that the party might have had time to plead, unless the rules of Court had made provision for a short rule to plead in these cases during the term. One or the other course must be pursued—if not, the judgment is erroneous.

SUPREME JUDICIAL COURT OF MAINE: APRIL TERM, 1848.

WEBSTER *v.* ABBOT.

Contracts made on Sunday are void, unless for works of necessity or charity. Comparison of Statutes.

THIS was an action upon a contract for the sale of real estate, which was made and signed on *Sunday*.

The Court (SHEPLEY, J.) decided that, by the statute of Maine, the contract was void because made on Sunday; that it was neither a work of charity nor necessity. The decisions in New Hampshire and Vermont were approved, and a distinction pointed out between the English statute and the statute of Maine. The former prohibits

labor to persons in their "ordinary calling," while the latter prohibits all "work, labor, or business, except of necessity or charity." The decisions, therefore, under the English statute, can afford no precedent, nor rule of construction under that of Maine. So, also, of the New York statute, which only prohibits "sales" on Sunday.

Judgment for defendants.

WILLIS and FESSENDEN, for the plaintiff; FESSENDEN, DEBLOIS and FESSENDEN, for the defendant.

SUPREME JUDICIAL COURT OF MAINE: APRIL TERM, 1848.

STROUT *v.* INHABITANTS OF DURHAM.

An inhabitant of a town, as well as a stranger, may maintain an action against the town for damages caused by a defect in the highway.

THIS action was for an injury sustained by the plaintiff from a defect in the highway in Durham. There was no doubt about the injury, or the defect in the road; but it was objected that the plaintiff, being an inhabitant of the town, and having notice of this defect, could not recover for the damage. But the chief justice, in delivering the opinion of the Court, replied separately to these objections, overruling them; and cited Rev. St., and *Reed* v. *Northfield*, 13 Pick. 94, in favor of the plaintiff. The statute makes no distinction between an inhabitant and a stranger, in respect to such injury. It is the duty of the town, both to notice defects in the highway, and repair them. An inhabitant has no authority to repair, and is not bound to do it, nor to give notice of the need of it.

Judgment for plaintiff.

HOWARD and SHEPLEY, for plaintiff.

FESSENDEN, DEBLOIS and FESSENDEN, for defendant.

COURT OF QUEEN'S BENCH: FEBRUARY, 1848.

THORPE *v.* BARBER.

WITNESS—CO-DEFENDANT, ADMISSIBILITY OF, IN ACTION OF TORT.

One of two defendants, in an action of tort, suffered judgment by default, and it was sought to call him at the trial to give evidence for his co-defendant: Held, that the proposed witness was inadmissible; and that being a party to the record, interested in the event of the suit, he was not within the privilege of the 6 & 7 Vict. c. 85.

TROVER for beans, peas, &c.

Plea,—by defendant Barber, not guilty by statute; the other defendant, Spall, suffered judgment by default.

This action was tried, before Coleridge, J., at the Spring Assizes for Suffolk, 1847, when it appeared that Spall, who was a constable, accompanied the defendant Barber to the house of the plaintiff to search for a lamb that had been stolen from Barber. Leave was given by the plaintiff to search his house for the lamb, which was not found there, but a large quantity of peas, beans, &c. were observed by the constable, who, suspecting they were stolen, took possession of them. Barber, the other defendant, procured a cart, in which the beans and peas were taken away; the plaintiff was taken into custody, examined before, and remanded by, the the magistrate. No owner could be found for the beans, peas, &c., which were subsequently demanded of the constable, who refused to deliver them. At the close of the plaintiff's case, BYLES, Serj. proposed to call Spall as a witness, not with a view to reduce the damages, but for the purpose of showing the innocence of Barber, who, he alleged, merely acted in the transaction in aid and assistance of the constable. On objection taken, the learned Judge ruled that his evidence could not be received.

A rule for a new trial had been obtained by—

BYLES, Serj., and now—

COUCH shewed cause. The learned Judge rightly rejected the witness at the trial. There is one case at Nisi Prius, *Ward* v. *Haydon*, (1 *Esp.* 552,) in which Lord Kenyon decided that a defendant in trover, who had suffered judgment by default, could be examined on the part of his co-defendant; but in this case the jury are summoned to try and to assess the damages, whereas it does not appear that it was so in that case.

[Maule, J. That would follow as a matter of course, would it not?]

No; the plaintiff might have entered a *nolle prosequi* against Haydon, who was called as a witness; and then that decision is reconcileable with the true principle which governs the admissibility of witnesses. The act 6 & 7 Vict. c. 85, does not affect this case; that act leaves admissibility of parties to the record as witnesses just as it stood before the act passed. The case of *Chapman* v. *Graves*, reported in a note to *Stevens* v. *Lynch*, 2 *Camb.* 333, n. decides that a co-defendant in an action of tort, cannot be called for a plaintiff, and some expressions are there used by Le Blanc, J., which seem to approve of Lord Kenyon's ruling in *Ward* v. *Haydon*, but the opinion there unnecessarily expressed does not make *Chapman* v. *Graves* an authority here. In *Mash* v. *Smith*, 1 *Car. & Pay.* 577, Best, C. J. admitted a witness out of deference to the opinion of Lord Kenyon, at the same time expressing his doubt of the admissibility, and the reason for that doubt must prevail here: "The witness may give such a complexion to the case as to reduce the damages." That is exactly the case here, and that decision is in my favor. It is submitted that a defendant in an action of tort is quite as much interested in favor of his co-defendant as he is in an action of contract, and it is unnecessary to quote cases to shew that in the latter form of action a defendant who has suffered judgment by default is not admissible. The rules on the subject are laid down in *Greenleaf on Evidence*, p. 501, and in *Phillips on Evidence*, vol. 1, p. 53. The reason for his exclusion is, that if the defendant, for whom he is called, obtains the verdict, the witness is also thereby discharged. The same result may occur in an action of tort, as appears from the case of *Biggs* v. *Benger*, 2 *Ld. Raym.* 1372, where a verdict having been found for one defendant on a plea which shewed that the plaintiff had no cause of action, the judgment was arrested as to the other, who had allowed judgment to go by default.

[Coltman, J. In that case the justification appeared on the record; it could not do so here.]

It is true that in the case referred to, there was a special plea, upon which the defendant succeeded; in this there is only the plea of not guilty "by statute," but under that a defence might be set up which would go to the whole canse of action, and the jury would then be directed to find nominal damages only against the defendant. It was suggested that the witness would be examined respecting the

innocence of his companion *only*, and not with a view to reduce the damages, but the two matters cannot be separated; they are mutually involved, and the alteration or addition of any fact, as it stood upon the plaintiff's case, would materially affect the damages. There is also direct authority to shew that the examination of a witness cannot be restricted to a single point; if called, he may be examined on every point connected with the case—*Hawkesworth* v. *Showler*, 12 *Mee. & Wels.* 45. Besides, it cannot be said that Spall was not a party interested in the suit: the jury were to assess the damages against him; he was, therefore, entitled to appear by counsel; and if called would be enabled to give evidence directly in his own favor.

T. Sanders, in support of the rule. The point to be decided is an important one, and since the time of *Wârd* v. *Haydon* it seems to have been generally admitted, in all the cases, as well as laid down in all the text-books on evidence, that a defendant in an action of tort, who has suffered judgment by default, may be examined for his co-defendant. From the report of that case it is evident that Lord Kenyon considered the point a good deal before he decided it. The defendants obtained the verdict, and his ruling seems never to have been questioned, though the plaintiff had every interest to move the Court, had there been any grave doubts about the correctness of his ruling. The report also shews that no *nolle prosequi* had been entered against the defendant, who was a witness: if such had been the case, his name need not have been mentioned at all, and the question about his liability to future costs would scarcely have been alluded to. The case is also to be found in *Peake's Additional Cases*, p. 126, and no suggestion of a *nolle prosequi* there appears. In *Mash* v. *Smith* the witness was admitted; and it cannot, therefore, be considered a decision against this rule. It does not appear what became of the verdict in that case; and the report is so unsatisfactory that it cannot be considered of much weight either way. *Chapman* v. *Graves* really decided that a defendant, who had suffered judgment by default, in an action of tort, was admissible as a witness for his co-defendant, but not for a plaintiff. The learned reporter states the law thus in a note to that case: "In an action of trespass, if one of several defendants allows judgment to go by default, he is not a competent witness for the plaintiff, *although he is for his co-defendants;*" and Le Blanc, J. says, referring to *Ward* v. *Haydon*, and a similar case, before Wood, B., at

Lancaster, "In those two cases the co-defendant was called to exculpate the other defendants; here it is proposed to call a co-defendant to inculpate the others, and therefore the witness is inadmissible." *Chapman* v. *Graves* has frequently been referred to with approbation—*Brown* v. *Brown*, 4 *Taunt.* 753, *Emmet* v. *Butler*, 7 *Ibid.* 607, *Mant* v. *Mainwaring*, 8 *Ibid.* 139; and thus there are the opinions of three different Judges (at the least) in favor of the admissibility of this witness. Lord Denman's Act does not affect the case; the witness can only be rejected on the ground of interest—*Warrall* v. *Jones*, 7 *Bing.* 395; and it is submitted that a defendant who had suffered judgment by default is called against his interest when called for a co-defendant. There is no contribution in actions of tort as there is in actions of contract; and it is his interest to fix his co-defendant, if possible, in order to transfer the whole liability, which now attaches to the witness, to that co-defendant.

[MAULE, J. There is sometimes contribution, and even more than that, in an action of tort. Suppose A. cuts down a tree, on the land of a third party, by the command of B.: if a verdict be obtained against both A. and B., B. would be bound to indemnify A.]

That would be upon B.'s express or implied assumpsit, arising out of collateral facts; and not referrable to the simple fact of a verdict against A. and B. jointly in an action of tort; whereas, in an action of contract, the verdict against A. and B. imports of itself a vested right of contribution *inter se*. It is not necessary to shew that in no possible event can a witness be interested, in order to render him admissible; if his interest be much less, or nearly equal, on one side, his evidence is admissible. It is said in *Starkie on Evid.* 3d edit. p. 105, in order to exclude a witness "the interest must be a present certain vested interest," and "not uncertain or contingent." The defendant here is much more interested to fix his co-defendant, and thus be enabled to escape all liability, than to reduce the damages; or at any rate the latter are so contingent and uncertain that the chance of their reduction in amount is not so vested an interest before they are assessed as to exclude him.

[COLTMAN, J. The damages are certain, for, whatever they are, he is liable to pay them.]

He must pay everything unless his co-defendant is fixed; and no way of putting the case can shew more strongly his interest against the party for whom he is called. The principles upon which the defendant was admitted in *Pipe* v. *Steel*, 2 *Q. B. Rep.* 733, shew that the co-defendant was admissible here; and in ejectment, which

is in its nature an action of tort, a defendant who has suffered judgment by default, is admissible as a witness for his co-defendant—*Dormer* v. *Fortescue*, *Bull. Nisi Prius*, 98, 285, *Hawkesworth* v. *Showler* does not apply: it was there proposed to call the wife of the defendant who had not suffered judgment by default; husband and wife are one and the same person, and examining the wife of a defendant is, in law, the same thing as examining the defendant himself; but in the judgment in that case Lord Abinger pointedly refers to, commends, and upholds the decision in *Ward* v. *Haydon*. The decision of the Judges in *Biggs* v. *Benger* is reported without any reasons; and there is an older case—*Marler* v. *Eylett*, *Cro. Jac.* 134, which decides that a defendant, in an action of tort, will not be discharged, though his co-defendant plead a justification on the record, and obtain a verdict. This witness was not proposed to be called to prove that no right of action existed against himself, but to shew the innocence of defendant Barber.

Coltman, J. I am of opinion that the learned Judge was right in rejecting the witness. It is said in the text-books no doubt since the authority of *Wood* v. *Haydon*, that a co-defendant, in an action of tort, who has allowed judgment to go by default, may be called for the defence; but the cases are not uniform, for *Mash* v. *Smith* is an authority the other way; and it appears from a case decided by Burroughs, J., *Webb* v. *Budd*, referred to in *Roscoe's Evidence*, p. 191, that a similar witness was rejected by him. *Webb* v. *Budd* is a later decision than *Mash* v. *Smith*, and this leads me to think that communication had taken place between some of the Judges since the ruling in *Mash* v. *Smith*, and that Burroughs, J. was then intentionally supporting the opinion of Best, C. J. in preference to that of Lord Kenyon. Upon this principle, it appears, the witness is inadmissible; he has the greatest interest in reducing the damages as low as possible; and it does not appear that Spall was to be called to give evidence on any point which was not necessarily involved and connected with the damages.

Maule, J. I am of the same opinion. The witness proposed to be called was a co-defendant, and, being a party to the record, he would not be admissible if he were interested in the event, not being within the privilege of Lord Denman's Act. I think that *Warrall* v. *Jones* overru es *Chapman* v. *Graves*, and shows that his evidence could not be received. Suppose you try it, as you would upon the *voir dire*, thus, Is this witness admissible (without reference

at all to what he is to prove) when nothing more appears than that he is upon the record? Clearly not, for Spall is interested to make the damages as small as possible. If we are allowed to look further than the record, and inquire what the witness was called to prove here, the answer is, he is not called to prove that another person was jointly guilty with me, which would not perhaps have materially affected the amount of the damages, but he is called to shew that there was no ground of action to the plaintiff; that the corn, &c. had been lawfully removed, or that his co-defendant was so little at fault that the damages should be assessed by the jury at the smallest possible sum. It appears to me, therefore, that the witness was directly interested, and to a very great extent, for the acknowledged and direct tendency of his evidence was to bring the suit to as favorable an end as possible, both for himself and for his co-defendant. As far as the cases go, *Worrall* v. *Jones* overrules *Chapman* v. *Graves*. *Ward* v. *Haydon* was doubted in *Mash* v. *Smith*, and ruled against in *Webb* v. *Budd* at Nisi Prius, by Burroughs, J. Both principle, therefore, and authority, are in favor of the rejection of this witness.

Williams, J. I am of the same opinion. Whatever may have been the professed intention for calling the co-defendant, he was inadmissible as a witness, for his evidence must have affected the amount of the damages. I should be sorry to add to those inconvenient and anomalous cases, in which it has been decided that a witness may be called for some purpose, but not for another.

Cresswell, J. had left the court. *Rule discharged.*

ENGLISH COMMON PLEAS—JANUARY TERM, 1848.

Lindus *v.* Bradwell.

BILL OF EXCHANGE—ACCEPTANCE BY WIFE OF DRAWEE IN HER OWN NAME.

A Bill of Exchange was drawn upon the plaintiff, and accepted by his wife in her name, she having authority to accept for him:—Held, that the plaintiff was liable on the bill as acceptor.

If a principal authorizes an agent to accept a bill, such principal is liable as acceptor, though wrongly described by his agent in the acceptance.

Assumpsit. The first count of the declaration stated that on, &c. one W. L. made his bill of exchange, and directed the same to the defendant, and thereby required the defendant to pay to the order of

the said W. L. 30*l.*, two months after the date thereof; that the defendant afterwards accepted the said bill, and that W. L. then endorsed the same to the plaintiff, &c. Second count, that the defendant, &c., was indebted to the plaintiff in 30*l.* on an account stated.

Pleas—First, as to the first count, that the defendant did not accept the said bill; second, as to the last count, non assumpsit. On which pleas issues were joined.

At the trial before Maule, J., at the first sittings for Middlesex in Easter term, 1847, the bill of exchange mentioned in the first count was produced and read, when it appeared that it was directed to William Bradwell, accepted by M. Bradwell; and that the acceptance was written by Mary Bradwell, the defendant's wife. It was proved that the defendant's name was William David Bradwell; that he was called upon when the bill became due, and that he then said, "I suppose you call about that bill; I know all about it; it is a milliner's bill. Mrs. Reece, my wife's milliner." The bill was then shewn him; he looked at it, and said, "It is my wife's acceptance, but it is all the same thing; I have authorized her for this particular. Mrs. Reece's for millinery." He also said, "There are several other bills besides this; I shall pay all of them in a week or ten days." It was submitted at the close of the plaintiff's case, by Talfourd, Serj. for the defendant, that there was no case to go to the jury, but the learned Judge directed a verdict for the plaintiff for 32*l.* 7*s.* (the amount of the bill with interest thereon,) reserving leave to the defendant to move to enter a nonsuit or a verdict for him on both or either of the issues.

A rule had been obtained accordingly, and also to shew cause why the damages should not be reduced to 30*l.* in the event of the Court deciding that the plaintiff could recover only on the second count.

Symons shewed cause. It is contended, on the other side, that the facts proved at the trial negatived that the defendant's wife had any authority to accept this bill, and therefore that the plaintiff must fail on the first issue; and, next, that as the conversation related to a void bill, there was no evidence on the second issue. It is, however, submitted that the circumstances are explicit to shew authority in the wife to accept this bill for her husband, and that more satisfactory evidence could scarcely have been produced on that head. It is then much relied upon, as a fact in favor of the defendant, that his name does not appear as

acceptor on the face of the instrument, and that, therefore, he is not liable to pay. *Cotes* v. *Davis*, 1 *Camb.* 485, is a case very similar to the present, and so is *Prestwick* v. *Marshall*, 7 *Bing.* 565; they decide that an indorsee who derives his title through a married woman, can recover against an acceptor, if the bill be indorsed by her and in her name with the consent of her husband. In *Davis* v. *Clark*, 6 *Q. B. Rep.* 16, which will be relied upon on the other side, the acceptor was a stranger, and not named as drawee, and the instrument there declared upon was not a bill of exchange at all, and that decision does not apply.

Talfourd, Serj., *Byles, Serj.*, and *Swann*, in support of the rule. M. Bradwell means the defendant's wife; there is a distinction between bills of exchange and other written agreements; no person whose name does not appear on a bill as acceptor can be charged as such. Unnamed principals are in no case bound.

[Cresswell, J. Suppose a drawee writes his acceptance in another name, is he not bound?]

It is submitted that he is not. The cases of *Cotes* v. *Davis* and *Prestwick* v. *Marshall* are cases of indorsement merely. In *Davis* v. *Clark*, Coleridge, J. says, "The safe course is to adhere to the mercantile rule, that an acceptance can be made only by the party addressed or for his honor. Here the last is not pretended, and the first cannot be presumed." Those remarks are strictly applicable to this case; *Polhill* v. *Walter*, 3 *B. & Ad.* 114, is to the same effect. There are three authorities which substantiate the proposition now contended for, namely, that a person whose name is not on the bill is not liable. In *Pentry* v. *Stanton*, 10 *Wend. R.* 271, cited in *Story on Agency*, p. 125, note 3, it was held that a person who drew a bill for goods bought on account of his principal, and signed it A. B. agent, was personally bound, and that the principal was not. In *Leadbitter* v. *Farrow*, 5 *Mau. & Selw.* 345, Holroyd, J. says, "I apprehend that no action would lie on the bill, except against those who are parties to it." There the plaintiff knew that the defendant was agent for the Durham Bank, and that he drew the bill as agent, but as he signed it in his own name, he was held liable. *Bult* v. *Morrell*, 12 *Ad. & El.* 745, is also in favor of the defendant; R. Parker, a member of a company, was there found not to have in fact accepted, and, therefore, was held not liable.

[Maule, J. The point did not necessarily arise in that case. The bill was drawn upon the directors, not upon the company, and Parker was not a director.]

There is no authority to show that a person whose name is not on a bill or note is liable. Suppose J to be the plaintiff in an action against A B, the maker of a promissory note; could A B show that he made the note as agent for John Smith? Clearly he could not: such an inquiry would be collateral, and, if once admitted, interminable in actions of this kind. If there was any evidence of any authority to the wife, it was to accept a bill drawn by Mrs. Reece, and not a bill drawn by W. L. Lastly, there is no evidence to go to the jury on the second issue. The admission is of a liability to Mrs. Reece on a bill, and therefore the defendant is not liable to the plaintiff for money due on an account then stated between them. The conversation related to the bill, and the bill alone; the bill was produced, and the defendant said, "I'll pay the bill;" that is no evidence on an account stated.

MAULE, J. There was considerable discussion when this cause was tried, as to the defendant's being bound by his wife's signature; I then expressed no opinion upon the matter, but reserved leave to the defendant to move the Court upon the point. I think that, in this case, the defendant is bound. In the conversation that was proved to have passed between him and one of the witnesses, the bill on which he is now sued was produced; he looked particularly at the acceptance on it, and then considered it was a bill of exchange he was liable to pay, for after looking at it, he said, "It's my wife's acceptance; it makes no difference. I gave her authority for that particular." Then if the defendant admits his liability on the bill, he also admits those facts from the existence of which his liability arises. If a husband authorizes his wife to accept bills for him, in her name, upon principle such husband is liable to pay the bills accepted, and *Cotes* v. *Davis* is an authority to support that principle. The acceptance on a bill such as this need not be in any particular form; it must be in writing, and that is all the stat. 1 & 2 Geo. 4. c. 78, requires. Then if a husband gives his wife authority to accept a bill in her name for him, he means she may accept such a bill as this, or he means nothing at all. It is said no person can be liable, unless his name be upon the bill; but suppose a party, whose name is on the bill as drawee, writes the acceptance on it with his own handwriting, in another and totally different name, is he not liable? Suppose the defendant here, whose proper initials are W. D. B., had so accepted this bill, which is directed to him as W. B., would he not then have been liable? Suppose he had accepted it

with his own hand, as M. B., how would it be then? In neither of those cases would the party be liable to pay, if the argument for the defendant is to be supported. The fact is, that in the cases supposed, the name of the party sought to be charged would appear on the face of the bill, and when it is urged that nobody but William Bradwell can accept this bill, I think so too. He has accepted it under the name of Mary Bradwell, the authority so to accept for him amounting to the same thing. The acceptance being in writing, the statute is satisfied; and I know of no principle which says such an authority is void.

Cresswell, J. *Cotes* v. *Davis* goes very nearly the whole length of the case we are now deciding. There the endorsement by a married woman passed the property in a note, for which the husband's indorsement is necessary,—as appears from *Barlow* v. *Bishop*, 1 *East.* 432; and in *Cotes* v. *Davis*, Lord Ellenborough directed the jury that the husband's authority to his wife to indorse, and in the name by which *she* was known, might be fairly presumed. That doctrine is subsequently recognized in *Prestwick* v. *Marshall*, and in *Prince* v. *Brunetti*, 1 *Bing. N. C.* 435. The jury have here found that the wife had authority to accept this bill. The defendant saw the bill, and expressed no dissatisfaction at the name by which he was therein described; he has therefore described himself by that name in the acceptance on this bill, and that acceptance is in writing, which is sufficient; this is not unlike the cases where partners in trade draw a bill, under the name of James & Co., when perhaps there is no person of the name of James in the firm. The defendant has consented to this acceptance as his acceptance, and he is, therefore, liable upon it.

Williams, J. If there were any evidence, at the trial, to go to the jury to disprove the first plea, this rule cannot be made absolute. It certainly would have been more in the usual course of business if the wife had written the husband's name as acceptor instead of her own; but he gave her authority to accept, and afterwards recognized the acceptance in the form she used; he is therefore liable to pay the amount.

Rule discharged.

SUPREME JUDICIAL COURT OF MAINE: APRIL TERM, 1848.

JORDAN *v.* PROTECTION INSURANCE COMPANY.

A petition for the removal of a cause from the State to the United States Courts, should be filed at the time of entering the appearance.

THE defendant's counsel in this case, entered an appearance generally for the defendants on the fifth day of the term in which the action was entered, and on the twenty-second day filed a petition to remove the cause to the Circuit Court of the United States, under the statute of the United States, and filed the necessary papers. the presiding judge ruled that their application came too late, and refused the prayer of the petition, to which the defendants excepted.

WILLIS and FESSENDEN, for plaintiff; FESSENDEN, DEBLOIS and FESSENDEN, for the defendant.

The Court (by TENNEY, J.) overruled the exceptions, deciding that by a fair construction of the statute, the petition for removing the cause should be made at the time of entering an appearance,—the object being to transfer the jurisdiction to another tribunal, and entering appearance generally acknowledged jurisdiction. The construction contended for by the defendant's counsel, that the *time* mentioned in the statute meant the *term* at which the action was entered, could not be sustained. There was no authority for giving the two words a synonymous meaning. The law requires that justice should be administered without delay. Removal of causes from one tribunal to another would create delay, and such petitions are not to be granted, as of course, unless the language of the statute clearly demands it. The judge commented upon a case in the Kentucky reports, and upon *Livingston* v. *Gibbons*, (4 Johns. Ch. R. 94,) which sustained his position.

SUPREME JUDICIAL COURT OF MAINE: APRIL TERM, 1848.

Mason *v.* Mason.

Assumpsit will not lie by one tenant in common against another for rents and profits of the common estate.

The parties to this action were tenants in common of a parcel of land, of which the defendant was in possession. The plaintiff undertook to cut grass upon the premises, but was forbidden by the defendant, who cut it himself. The plaintiff afterwards brought an action of *assumpsit* (declaring in a count for money had and received,) for one half of the income of the land. The defendant objected that *assumpsit* would not lie by one tenant in common against another for the rents and profits of the common estate.

Howard and Shepley, for the plaintiff; Fessenden, Deblois and Fessenden and True, for the defendant.

The Court (by Shepley, J.) sustained this position, denying the position of the plaintiff, that an action of *account* would lie, and therefore *assumpsit* would lie also An action of *account* will not lie, at common law, by one tenant in common against another; and the Statute of Anne, which altered the common law, gave the action of account only where one tenant in common received more than his just share as bailiff. And in England, under this Statute, it has been decided that the tenant, who takes the income merely, is not liable in an action of account: he must be the bailiff of the other tenant, and, as such, receive more than his share. There is no case in which an action of *assumpsit* has been sustained on any different principle, and none can be sustained unless money has been actually received, or one tenant holds the share of the other as bailiff. The case of *Monroe* v. *Luke*, 1 *Met.* 459, was decided on this principle. The defendants, in that case, took the whole rents and profits in money.

Judgment for defendants.

Miscellaneous.

Infringement of Patent. [United States Circuit Court: Gorham v. Mixter, et al. From the Boston Daily Advertiser of July 6, 1848.] This was an action on the case for an alleged infringement of a patent, "for an improvement in the machine for pressing palmleaf hats." The defence set up was, 1. That the defendants had not infringed; or in other words, that the machine used by them was substantially different in its construction and mode of operation from the machine described in the plaintiff's specification of claim in his letters patent. 2. That the plaintiff was not the first and original inventor of the machine patented, but that the same was known and used prior to the supposed invention thereof. The plaintiff made application in the autumn of 1839, and obtained his letters in March, 1840.

The history of the art of pressing in this Commonwealth, so far as it was known to witnesses, was traced from 1830 to the present trial. In 1830, the machine in general use had three blocks for the hat, with a lever and flat to each, and the pressing of the rim, crown, and top of the hat was performed separately, at three successive operations, on the respective blocks, by removing the hat from block to block. These blocks were attached to revolving shafts, which were moved by hand or other power, as circumstances dictated; and the levers to which the pressing flats were attached, were managed, and the pressing done, by hand. In 1832, the plaintiff made an attempt to improve upon the old machine. He constructed a machine in which but one block was used, and made an angular flat to fit the top and side of the hat at once, thereby pressing the whole hat without removing it from the block. It did not appear in evidence, however, that by this arrangement the whole hat was pressed at one operation, without a change of flats. A similar machine to the last, though somewhat improved in its structure, was shown to have been put in operation in 1834 by one Brown, of Dana, Massachusetts, used for a time, and abandoned. Also, one Charles Rice, of Boston, testified for the defence, that in 1835 he constructed a machine of the same general character, using one lever and one flat; that in 1835 he added the second lever and flat, making the two answer the purpose of three flats: and in 1838 he added the third lever and fourth flat. In this machine, the block shaft was turned, and the levers operated by hand, but the whole hat was pressed by one operation.

In the year 1837 the plaintiff invented, and put in operation, a machine with one block, three levers and and the same number of flats, by which the hat in all its parts was pressed by one operation. The shaft was moved by water power, and the levers to which the flats were appended, were fastened by a catch, so as to press upon the hat while it revolved in connexion with the shaft, thus dispensing with the power of the operator, and in a measure acting automatically. In the machine patented by the plaintiff, four flats, two for the rim on opposite sides, one for the side of the crown, and one for the top, are attached to a sliding frame, which by means of a lever is brought to, and removed from the hat block at pleasure. The hat is placed on the block with a table for the rim, on a vertical rotating shaft. After the hat is placed the sliding frame is brought forward by means of the lever bringing all the flats to

their relative and proper position, over and against the hat. Then another lever is detached from a catch, which permits a weight to act upon a third lever, which in its turn acts upon the vertical shaft, surmounted by the hat, and brings the hat into contact with the flats, while the shaft revolves, and the pressing is done. After being thus put in motion, no farther attention from the operator is required, until the hat is sufficiently pressed, and one man can operate three or four machines at the same time, pressing from twelve to fifteen hundred hats per day; while on the old hand machine, one man could ordinarily press but five hundred per day.

This machine, and what the plaintiff contended were modifications of it, soon after its construction, came into general use, and superseded all that had gone before. The defendants claimed that the modification used by them was an original invention of one Paul Hildreth, formerly of Petersham, made subsequently to the plaintiff's patent. This was denied by the plaintiff, and he insisted that it was taken from his machine; but, under the ruling of the Court, it was immaterial whether an original invention or otherwise, being subsequent in point of time to the plaintiff's invention and patent.

The point most strenuously argued by the defendants was, that their machines differed substantially from the one patented by the plaintiff; and on this point, under the ruling of the Court, the case turned. The question arose what the plaintiff had claimed and patented; whether a machine *as* a machine, new in its structure as a whole, or merely a new combination of old parts; and if a combination merely, whether a combination effected by *any* mechanism, or a combination effected by *the* means, and operating in the particular manner described in his specification of claim. If the latter, the question of priority of invention was disposed of, for it was not pretended that any prior machine contained the same combination, *constructed* and *operating* in the same way. But it was contended on the part of the defendants, that if this construction were given to the claim, they did not infringe, as some of the elements of combination in their machine were constructed and operated substantially different from corresponding elements in the plaintiff's.

On the question of identity, the plaintiff called as experts, Thomas Blanchard and R. H. Eddy, of Boston, and the defendants called Charles M. Keller of New York city.

Sprague, J. charged the jury, that the plaintiff had claimed and patented a combination, constructed and operating as described in his specification, and to those he was limited. To constitute an infringement, the defendants must have used the same combination, constructed and operating substantially the same way; that if they had used only two of the three elements of combination, it was not an infringement. Nor was it an infringement, if any one or all their elements of combination were constructed and operated substantially, different from plaintiff's.

Yet a mere change in form or proportion, or a substitution of mechanical means or equivalents, in any one or all the elements, producing the same result, would not constitute a substantial difference within the meaning of the patent law. Nor would it be a defence, that they had added to the combination, or any element thereof, and made improvements, provided they used the plaintiff's combination, constructed and operating substantially in the same way. Such additions and improvements, though meritorious, gave them no right to appropriate what belonged to another, without making compensation.

It was for the jury to say, in view of the evidence, under the instructions of the Court, and from an inspection of the models before them, whether the defendants' machine did in fact contain the combination claimed by the plaintiff, constructed and operating substantially in the same way.

The jury returned a verdict for the plaintiff, and assessed damages at $1100, $500 of which was for use of the machines, and $600 for counsel fees.

RUFUS CHOATE and H. E. SMITH, for the the plaintiff; B. R. CURTIS and CYRUS CUMMINGS, for the defendants.

Naturalization. Congress has passed a bill so amending our naturalization laws, that any immigrant who has had a residence for five years in this country, and over two years past declared his purpose to become a citizen, shall henceforth be entitled to naturalization, although he may have meantime been once or many times out of the country.

Change in the Law of Evidence in New York. One of the most important innovations of the new Code of Procedure is, that "no person offered as a witness shall be excluded by reason of his interest in the event of the action." On the 1st of July the provision took effect, as well in relation to suits hereafter commenced as those now pending. All discussion of the point of interest is precluded, the witness admitted, and credibility left to the jury.

Damages for Loss of Life—a good Law. The last Legislature of New Jersey passed a law giving to surviving relatives a legal claim to damages against corporations and persons by whose wrong or neglect a husband, father, brother, child, or other relative, may have been deprived of life, and recommended it to the consideration of the law-making power of the different States.

In vol. v. p. 233, we published the English Statute upon this subject.

Right to practise Law in New York. [Supreme Court, Special Term.] Mr. Goff, relative to whom a decision was made the other day, declaring the law unconstitutional, which gives power to suitors to appoint, in writing, their own attorneys, although not a lawyer, to attend to their cases in Courts, rose to make a motion in regard to a case he has in hand. Judge Edmonds told him, under the decision he has no right to attend to legal business, or address the Court in relation to it. Mr. Goff insisted he had a right under the Statute to aid as an attorney. The Judge said the Statute has been declared to be unconstitutional, and his only remedy would be an appeal from the decision of Judge Edwards; and until that decision was reversed, it was equally binding on this Court and on Mr. Goff. In answer to a remark from W. Barber, Judge E. said Mr. G. would perhaps hand the cases over to some other gentleman to conduct.

Building Contract. [Court of Common Pleas, New York—before Judge Ulshoeffer. Woodruff *v.* Cleaveland.] Action by a mason to recover a balance of about $500 for mason's work done on store No. 66 Liberty St. The defence is, that Mr. Cleaveland sustained damages equal to the amount by the building not being finished at the time specified. In answer to this it was averred, that the delay was partly owing to Mr. C.'s own agents, in not clearing away the old building in season, and delay caused in propping up the adjoining buildings; also, that the contract gave power to Mr. C., if dissatisfied with the progress of the building, to put on extra hands and charge it to the contractor, which he never did, nor gave any intimation of an intention to deduct for delay, till after the building had been completed and delivered to him.

The Court charged, that where a person contracts to put up a building by a specified time, he takes all ordinary risks, and must abide by his contract; and an owner

is at liberty to deduct from amount due to make up for loss of rent, or other damage which he may have received, unless the delay has been caused by the act of the owner himself or his agents. Although the owner may be at liberty, by the contract, to put on extra hands and hasten the building, he is not obliged to do so, and yet may recover for delay. If an owner accepts possession of a building, he is bound for the contract price, unless he can show to a jury that he has incurred damages by a non-fulfillment as to work or time.

The jury considered that some portion of the delay was caused by Mr. Cleaveland himself, and gave a verdict for plaintiff of $142.54.

Slavery. It will be remembered that some few weeks since, a slave, in Covington, Ky., killed his wife and child, and attempted to kill himself, to avoid being sent to the South, with the prospect of being separated. He has been tried for murder, and acquitted; and the citizens intend to purchase his freedom. We have no details of the trial.

Wheaton's Selwyn's Nisi Prius. [An Abridgment of the Law of Nisi Prius, in two volumes, by William Selwyn, Esq., of Lincoln's Inn, with Notes and References to the decisions of the Courts of this country, by Henry Wheaton, Thomas J. Wharton, and Edward E. Law. Sixth American edition—with a Supplement, containing Notes of recent English and American authorities, by J. G. Marvin—two volumes. Philadelphia: Thomas, Cowperthwaite & Co. 1848.]

This is the sixth American, from the ninth London edition, with a Supplement of 300 pages, embracing notes of American cases not before cited, down to the present time, as well as pertinent new matter found in the eleventh English edition of the same work.

Wheaton's Selwyn is well known to the profession. It is deserving a place in all good law libraries, and this Supplement adds much value to this edition. It is for sale at the Law Bookstore of J. F. Desilver, of this city.

Law according to Punch. We have it on excellent authority, that if A owes B money, and A is the owner of an elephant, B may detain the elephant's trunk till the debt is paid; and it is also tolerably clear in all the books, that a boa-constrictor lying dormant, as if dead, in a deal-box, is recoverable by an action on the case; but if the plaintiff mixes himself up with the boa-constrictor, so as to identify himself with it, he, the plaintiff, will not be recoverable at all. If the boa-constrictor should unfold his tail early enough, the plaintiff may have a severance; but otherwise, says Mr. Justice Maule, he must inevitably be quashed.